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Letter dated 7 April 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my predecessor's letter of 23 February (S/2005/121). The Counter-Terrorism Committee has received the attached fifth report from Austria submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex). I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Ellen Margrethe **Løj**
Chairman
Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism

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Annex

Note verbale dated 1 April 2005 from the Permanent Mission of Austria to the United Nations addressed to the Chairman of the Counter-Terrorism Committee

The Permanent Mission of Austria to the United Nations presents its compliments to the Chairperson of the Committee and, with reference to the letter dated 19 January 2005 from the Chairperson, has the honour to transmit herewith Austria's fifth report on the implementation of Security Council resolution 1373 (2001) (see enclosure).

Enclosure

31 March 2005

Additiona[1] information submitted by Austria to the Committee established pursuant to paragraph 6 of resolution 1373 (2001) adopted by the Security Council at its 4385th meeting on 28 September 2001

In its letter of 19 January 2005 the Chairman of the Counter-Terrorism Committee (CTC) established pursuant to paragraph 6 of United Nations Security Council Resolution 1373 (2001) asked Austria to submit further information on specific topics concerning measures taken to combat terrorism. Austria is therefore pleased to provide the CTC with the following additional information.

1. Implementation Measures

1.1 The CTC noted that Art. 278c Para. 3 of the Austrian Penal Code constitutes a political exception for the prosecution of terrorist's acts. This provision does not appear to accord with Art. 6 of the Convention against Terrorist Financing and Resolution 1373 nor with certain provisions of the Resolution (e.g. Preamble and Paragraph 3 (g). The CTC would appreciate learning how Austria intends to deal with this issue?

This provision does not constitute a political exception clause as one can find in some international conventions but rather reflects the EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA). This EU Framework Decision stipulates the respect of the fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the principles recognised by Article 6 (2) of the Treaty on European Union reflected in the Charter of Fundamental Rights of the European Union. The Framework Decision also explicitly notes in Article 1 Para 2 that the decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. This provision therefore does in no way provide a special treatment for terrorists or a political exception clause.

Furthermore, this provision does not preclude the applicability of any other criminal offence and therefore will never lead to impunity of the perpetrator.

1.2 Further in this regard, the CTC would be pleased to receive information about amendments to the Penal Code to introduce criminal liability of legal persons, in order to implement the Second Protocol to the European Union Convention on the Protection of the Financial Interest of the European Community, as well as Art. 5 of the International

Convention for the Suppression of the Financing of Terrorism, as well as sub-paragraph 1 (a) and 1 (d) of the Resolution.

After long and difficult consultations with the private sector the Federal Ministry of Justice has published in June 2004 a draft bill regarding the criminal liability of legal persons and invited the public to submit opinions following the normal procedure before a government bill is put before Parliament.

The Ministry of Justice is currently drafting a Government Bill based on the draft bill and some 80 opinions received. Although the representatives of the private sector, the chamber of commerce in the first instance, have agreed in principle to the draft bill, there is still a need for further consultation with them. It is planned, however, to bring the Government Bill before Parliament before the summer break. Debate in Parliament is foreseen for autumn and according to the planned time schedule the new law could enter into force on 1 January 2006.

The draft bill provides for responsibility of legal persons and other bodies, like partnerships, for all penal offences (so there is no list of offences). Thus, there will be responsibility for all offences including terrorist offences.

The responsibility of a legal person would not exclude the liability of natural persons for the same act.

The prerequisites for the responsibility follow largely the model in the EU Second Protocol and other EU instruments: it explicitly provides for a responsibility based on an offence of a person with a leading position on the one hand and for a responsibility based on the lack of supervision or control of such a person in a leading position which has made possible the commission of an offence by a person under its authority on the other hand.

Proceedings against a legal person would be initiated by the public prosecutor and be dealt with by the same Court which would be competent to deal with the proceedings against the natural person. The normal procedure would be that both proceedings take place in parallel; however, if it is not possible to prosecute natural persons, e.g. because they are not known, have fled or have died, it will also be possible to prosecute only the legal person.

The main sanction against a legal person will be a fine. The maximum amount of the fine will depend on three factors: the gravity of the offence, expressed by the maximum term of imprisonment provided for by the penal law; the turnover of the legal person and the return of the legal person.

1.3 **In relation to the implementation of sub-paragraph 2 (a) of the Resolution, the CTC would be grateful to receive a progress report on the amendment of the Foreign Trade Act, which would allow Austria to ratify the United Nations Protocol Against the Illegal Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition.**

After approval by the Federal Government in January 2005, the proposed new Austrian Foreign Trade Act 2005 was submitted to the Austrian Parliament. According to the planned time schedule, the Foreign Trade Act 2005 should enter into force on 1 October 2005 thus providing the necessary

internal legal provisions to ratify the United Nations Protocol Against the Illegal Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition.

1.4 The CTC would appreciate receiving information about the introduction of a legal obligation of travellers to declare any cash on hand, as well as any other means of payment, which is currently under consideration, according to paragraph 1.16 of Austria's fourth report.

The Fifth Amendment to the Austrian Customs Law that entered into force on 1 May 2004 includes provisions concerning cash control. Customs officers have the power to ask travellers and to control the transfer of cash and other means of payment across the borders. The relevant provisions of the Fifth Amendment to the Austrian Customs Law are:

- Article 17b according to which customs authorities have to monitor transfers of cash or equal means of payment (instruments payable to bearer) across Austrian borders. Upon request the persons have to inform the customs authorities whether they carry cash or equal means of payment equalling or exceeding € 15.000 with them. In such case they have to provide information about its origin, the beneficial owner and the intended purpose.
- Article 17c Para 1 according to which if the factual circumstances seem to suggest that the transfer of cash or equal means of payment serves the purpose of money laundering the customs authorities are entitled to seize the cash or the equal means of payment provisionally in cases of pending danger. The customs authorities shall inform the Prosecutor's Office of the seizure without undue delay. The customs authorities shall lift the seizure as soon as the Prosecutor's Office declares that the prerequisites for imposing a provisional measure pursuant to Article 144a Criminal Procedure Act (StPO) or for a seizure pursuant to Article 98 Para 2 or Article 143 Para 1 Criminal Procedure Act (StPO) do not exist. In any event, the order shall lapse six months after its imposition or as soon as a court has made a final decision on a petition for imposition of a provisional measure or a seizure.
- Article 17c Para 2 according to which the customs authorities may gather, process and use personal data which result from a control of a transfer of cash or equal means of payment. The customs authorities shall provide the Prosecutor's Office and the Financial Intelligence Unit with all data that are necessary for the fulfilment of their statutory duties.

1.5 Finally, the CTC would like to receive a progress report on the accession of Austria to the revised International Convention on the simplification and harmonization of Customs procedures (Kyoto Convention) which, according to the fourth report, "is currently being prepared."

By the same time as the Fifth Amendment to the Austrian Customs Law the parliamentary ratification process for the Kyoto Convention was finalized. Subsequently, Austria deposited her instrument of ratification on 29 April 2004.